Pennsylvania Academy of the Fine Arts *and* American Federation of State, County & Municipal Employees, District Council 47. Case 4–RC–20710

December 6, 2004

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS WALSH AND MEISBURG

On April 9, 2003, the Regional Director for Region 4 issued a Decision and Direction of Election in which she found that the petitioned-for artists' models are statutory employees under Section 2(3) of the National Labor Relations Act. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review, contending that the models were independent contractors and that the petition should be dismissed. By Order dated February 11, 2004, the Board granted the Employer's request for review. The Employer and the Petitioner filed briefs on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, including the briefs on review, we find, contrary to the Regional Director, that the models are independent contractors under the Act. Consequently, we dismiss the petition.

Facts

The Employer operates a school and museum in Philadelphia. Its art school offers a 4-year certificate program, a 2-year Masters of Fine Arts, continuing education programs, and children's programs. The contested individuals model for art classes at the Academy. About half of the classes use models regularly.

The models sign contracts with the Academy for each semester. Carey Gates, the models and properties coordinator, draws up a list of class dates and times for which a model will be needed, and the models can choose which available classes they wish to work. The resulting schedule is part of the semester contract.

The pay rate is set forth in the contract. The models are free to undertake other modeling work outside of the Academy.

The contract states that the models are independent contractors. Either party can cancel the contract on 2 weeks' notice. The models are not subject to evaluations or discipline. However, the contract also states that the Academy can immediately cancel the contract based on the model's "lateness, absence, failure to fulfill scheduled commitments, or refusal to comply with reasonable requests." The only evidence of the Academy's canceling a model's contract is from the spring semester of 2003. In that instance, a model's contract was canceled because of egregious tardiness and absenteeism.

Classes are approximately 3 hours long; models are paid for the entire class for which they are scheduled, regardless of whether their services are needed for the entire 3 hours. The number of hours worked by different models varies greatly, ranging from 1.5 to 226 hours in the period from July 1 to September 28, 2003.

The contract gives the instructors only the right to determine the general pose assumed by the model. The contract states the "specific form of a pose, including wardrobe, will be left to [the models'] discretion, so long as the form meets the general requirement requested by the instructor for said pose." The models testified that often they are given only general instructions, such as "standing, leaning on one hip," and it is up to the models to determine the particulars of the pose.

The models bring their own robe and shoes to wear on their breaks, and some sort of cloth "for their private areas" for sitting and reclining poses. If they wish, the models may bring additional equipment such as padding and poles to support poses. The Academy provides timers, heaters, lamps, and other equipment to the models. The contract prohibits the models from speaking with the students while posing and sets the length of the poses and breaks.

The models do not receive most of the benefits offered to the Academy's employees and do not receive an employee handbook. The models receive IRS 1099 forms, rather than W-2 forms.

Analysis

To determine whether individuals are statutory employees or independent contractors, the Board applies the common-law agency test, which considers all the incidents of the individual's relationship to the employing entity.[1] See *Roadway Package System*, 326 NLRB 842 (1998); *Dial-A-Mattress Operating Corp.,* 326 NLRB

[1] The Board generally considers 10 factors, derived from the common-law Restatement of Agency, to be among those relevant to this inquiry: (1) the length of time the individual is employed; (2) the method of payment, whether by time or by the job; (3) whether the employer or the individual supplies the instrumentalities, tools, and place of work; (4) whether the individual is engaged in a distinct occupation or business; (5) whether the employer is "in the business"; (6) the skill required in the particular occupation; (7) whether the employer retains the right to control the manner and means by which the result is to be accomplished; (8) whether the parties believe they are creating an employment relationship; (9) whether the work is part of the employer's regular business; and (10) whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain. See *BKN, Inc.,* 333 NLRB 143, 144 (2001); *Roadway Package System*, 326 NLRB 842 (1998); and *Dial-A-Mattress Operating Corp.,* 326 NLRB 884 (1998).

884 (1998). We conclude that the evidence demonstrates that the models are independent contractors under this test.

Each semester, the models alone decide whether to work for the Academy during that semester. If they choose to do so, they exercise complete control over their own schedule; they decide how many classes to accept and what hours to work. Further, the models choose which specific classes they will accept. Thus, they may choose their schedule according to which professors they prefer, which types of classes they prefer, which class times are convenient for them, or on any other basis they wish. Some models have chosen to work only 1.5 hours in a semester, while others have chosen to work hundreds of hours in a semester. The models' freedom to control their own schedule with the Academy is sweeping, despite the minor constraints noted by our dissenting colleague. Moreover, in exercising this freedom and choosing how many hours they wish to work for the Academy, the models can control their earnings. The extent to which the models control their own schedules and earnings strongly supports independent contractor status.

Likewise, the models' method of pay supports a finding of independent contractor status. The models are paid per class, not by the hour or on a salary basis. See *Young & Rubicam International,* 226 NLRB 1271, 1274 (1976). They do not receive most of the benefits that the Academy's employees receive. See *DIC Animation City, Inc.,* 295 NLRB 989 (1989). Further, each contract is valid only for a semester; the Academy and the models have no ongoing relationship indicative of employee status.

In an employer-employee relationship, the employer generally supplies the instruments and tools of work. Here, the models supply their own robes and slippers and are sometimes requested to bring costumes. If they prefer to use padding, poles, and other equipment to support their poses, the models supply those items themselves.

The record establishes that models are engaged in the distinct occupation of modeling. The models can work for other schools or independent artists and set their own fees when they do so.[2] Thus, if a model can earn more from these other sources, she can minimize her hours with the Academy and maximize her outside employment. Contrary to our dissenting colleague, we find that the freedom to take as many or as few jobs as one wishes and to work for various employers is highly indicative of independent contractor status. See *DIC Animation City*, 295 NLRB at 990; *Young & Rubicam International*, 226 NLRB at 1274–1275.

[2] Model Cheryl Breese testified that she considers modeling her "self-employment."

The evidence demonstrates that the models have a high level of skill. Our dissenting colleague minimizes the significance of the record evidence demonstrating the skills necessary to strike and hold a pose. One model testified that her job is to discern what the class needs and decide how to best meet those needs in her pose, a process she considers "artistic and creative co-creation" with the instructor and the students. Another model testified that she uses numerous skills in the course of modeling, including her understanding of light and shadow, color, and composition, and physical skills in holding strenuous poses for long periods of time. The Academy offers the models contracts with the expectation that they have the professional modeling skills to perform the job competently; they do not receive any on-the-job training and the Academy does not supervise the quality of their work. Indeed, the models are not subject to evaluations or discipline, as are employees of the Academy. Compare *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258–259 (1968).

Furthermore, the evidence indicates that the Academy sets only a general requirement for a pose. The particular manner of fulfilling that requirement is left to the discretion of the model. The Academy controls only the result—the look of the pose—not the means by which the model achieves that result. As one model put it, she "almost always" has "discretion in the exact pose." Contrary to our dissenting colleague, we find that the evidence establishes that the models retain significant discretion over how they perform their work, which strongly supports independent contractor status.[3] See *The Comedy Store*, 265 NLRB 1422, 1422 (1982).

In addition, the Employer is in the business of providing instructions to art students. The models are in the different business of modeling.

Finally, the contract between the models and the Academy explicitly reflects each participant's understanding that the models are independent contractors. Consistent with this, they receive an IRS Form 1099 for miscellaneous income, rather than IRS Form W-2 for wages paid to employees.

For these reasons, we find that the models are independent contractors. Therefore, we reverse the Regional Director's findings and dismiss the petition.

[3] Contrary to our dissenting colleague, our decision does not "potentially exclude all those engaged in creative endeavors" from employee status under the Act. Whether an individual is engaged in a creative endeavor, physical labor, or any other type of work, the issue is to what extent the employer controls not only the result of the work, but the means by which the result is accomplished. We find that in this particular case, the models retain wide discretion both in the pose itself and the means by which the pose is accomplished. Our decision is not nearly as sweeping as our colleague suggests.

MEMBER WALSH, dissenting.

In finding the models who work for the Academy to be independent contractors, my colleagues have failed to take a step back and look at all of the incidents of the relationship between the models and the Academy, as Board law requires, to determine if the models are truly independent contractors rather than employees. They have also underemphasized the factors that tend to show employee status, while exaggerating many of the factors that point the other way. In my view, by no stretch of the imagination can these models, whose terms and conditions of employment are constrained and determined in so many different ways by the Academy, be considered independent business people in their relationship with the Academy. The Academy has simply not met its burden of proof to show that they are independent contractors. Accordingly, I dissent.

I. THE APPLICABLE LEGAL STANDARD

The party seeking to exclude employees as independent contractors has the burden of proving that status. *BKN, Inc.,* 333 NLRB 143, 144 (2001). Here, therefore, the burden is on the Academy to show that the models are independent contractors. The Board applies the common-law agency test to determine whether individuals are statutory employees or independent contractors. This determination "ultimately depends upon an assessment of all of the incidents of the relationship with no one factor being decisive." See *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968), enf. 154 NLRB 38 (1965).

The relevant factors include (1) whether the employer retains the right to control the manner and means by which the result is to be accomplished; (2) whether the individual is engaged in a distinct occupation or business; (3) whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain; (4) whether the employer or the individual supplies the instrumentalities, tools, and place of work; (5) the skill required in the particular occupation; (6) whether the parties believe they are creating an employment relationship; (7) whether the work is part of the employer's regular business; (8) whether the employer is "in the business"; (9) the method of payment, whether by time or by the job; and (10) the length of time the individual is employed. See, e.g., *BKN*, *Inc.,* supra, 333 NLRB at 144; *Roadway Package System,* 326 NLRB 842 (1998). This list of factors is not exhaustive, and the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors in another case. See *Roadway Package System*, supra, 326 NLRB at 850. In sum, the Board balances all the incidents of the employment relationship in order to determine whether the circumstances demonstrate an employment relationship between employer and employee or a business arrangement between an independent contractor and client.

II. ANALYSIS

The Academy's Right to Control

My colleagues emphasize the models' freedom to choose their assignments. However, this freedom is sharply constrained by their contract with the Academy. The models are not completely free to choose their own hours; they must select among preset classes, and once they have made that choice they are required to be present during a specific period of time, from 15 minutes before the scheduled start of class until the end of class. Moreover, if the models are not needed in their scheduled assignment, they may not leave but must report to the models and properties coordinator for reassignment to any classroom in which a model is needed, even if they do not wish to model for that class or that instructor. They are not free to turn down the alternate assignment. Such constraints are indicative of employee status—an independent contractor can generally determine her own hours and choose to accept or decline assignments at her complete discretion.

The contractual arrangement between the Academy and the models is indicative of an employer-employee relationship in other respects, as well. The models have no meaningful opportunity to bargain. The Academy uses a standard contract, with standard fees, for all models, regardless of the skill or experience of the model. The models must either accept or reject the contract as is. Moreover, the contract dictates many details of employment. The models may not speak to students while posing. Models must hold poses for 20 minutes when physically possible and are only entitled to a 5-minute break every 20 minutes. They must cover their body and put shoes on while they are not posing. Models can be terminated for lateness, absence, or insubordination.

The Academy's instructors dictate the models' poses. The record demonstrates that the instructors commonly dictate the general elements of the pose that they deem important to the class objectives, but leave the specific elements of the pose to the model's discretion. My colleagues minimize the instructors' control over the models' pose and emphasize the models' contractual right to determine the specific form of their pose, subject to the instructor's general directions. They conclude that the models have discretion over the manner in which they fulfill the instructor's required result. I disagree. The majority exaggerates the significance of the models'

discretion. The models cannot be said to have control over the means by which they accomplish their work when the instructors are physically present and reviewing every element of their body position. The discretion to hold one's hand palm up or palm down, for instance, is not the type of control that is indicative of independent contractor status. The fact remains that the Academy, through its instructors, dictates the models' poses, despite the fact that the models may be able to choose, for instance where to place their hand or foot while executing the pose designated by the instructor. To base a finding of independent contractor on this very limited discretion would potentially exclude all those engaged in creative endeavors from the statutory definition of employee.

Distinct Occupation or Business

The models are not engaged in a distinct business. Contrary to my colleagues' contention, their opportunity to undertake modeling work outside of their relationship with the Academy does not establish that they are independent contractors engaged in a distinct business. It simply indicates that they work part-time for the Academy. It is common for part-time employees in all fields to have more than one job at a time. Moreover, the models depend heavily on the Academy for a large portion of their work during the academic year. For example, Cheryl Breese, although she described modeling as her "self employment," in fact testified that the Academy provided 50 percent of her work in Spring 2002 and 90 percent of her work in Fall 2003. This pattern of work is certainly more consistent with part-time employment than it is with being an independent contractor.

Entrepreneurial Opportunity and Risk

The models do not bear an entrepreneurial risk of loss or enjoy an entrepreneurial opportunity for gain. Entrepreneurial risk and opportunity exist when an individual's profit is dependent on his ability to recoup in the contract fee the investment he has incurred, in terms of time or money expended, in obtaining and fulfilling the contract. See, e.g. *BKN, Inc.,* supra, 333 NLRB at 145. The models risk nothing by contracting with the Academy. They expend minimal time obtaining the contract; they merely attend a brief interview with the models and properties coordinator. Compare *DIC Animation City, Inc.*, 295 NLRB 989, 991 (1989) (writers exert time, effort, and travel to solicit work for which they will not get paid if their ideas are rejected). The models do not incur a significant financial investment in meeting their responsibilities under the contract. Compare *DIC*, supra, 295 NLRB at 991 (writers invest in offices, computers, software, typing assistance).

Nor do the models have any entrepreneurial opportunity for gain. They do not have the opportunity to increase their income from the Academy under future semester contracts based on good performance or ingenuity, as the Academy has one standard fee it pays all models regardless of their experience or past performance. The only way they can increase their income from the Academy is to accept more hours of work as offered by the Academy. Contrary to the views of my colleagues, the availability of more work, in itself, does not constitute the opportunity for entrepreneurial gain indicative of independent contractor status. See *BKN, Inc.,* supra, 333 NLRB at 145; compare *DIC*, supra, 295 NLRB at 991.

Tools and Instrumentalities of Work

Contrary to my colleagues' contention, the Academy in fact provides most of the necessary tools and instrumentalities of the models' work, including timers, heaters, lamps, costumes, and all other necessary tools.[1] The models are contractually required to bring a robe and shoes to wear on their breaks, and some sort of cloth "for their private areas" for sitting and reclining poses. None of these items are specific to models—they are ordinary pieces of clothing. Any other items they might bring, such as padding, poles, or other equipment to support their poses, are also not crucial to their work for the Academy and are primarily for their own comfort. My colleagues have placed far too much reliance on the fact that the models bring in their own robes and slippers and other personal comfort items; this is clearly not an indication of independent contractor status.

The Skill Required

There is no support in the record for my colleagues' contention that the models have a "high level of skill." In fact, these models have no special training and there is no specific training or experience required to work for the Academy. Models and properties coordinator Carey Gates testified that he does not hire models based on their previous experience; when he discusses the contract with them he ascertains by looking at them whether their form will be helpful in the Academy's classes. It appears that all individuals who request modeling work with the Academy are offered work. Thus, the models' skill level does not support my colleagues' conclusion that they are independent contractors. See *United Insurance*, 390 U.S. at 259 (that debit agents

[1] Models and Properties Coordinator Gates is responsible for managing the various equipment the school maintains for use during any modeling session.

had no prior training or experience one of several "decisive factors" in finding them to be statutory employees).

Whether the Work Is Part of the Academy's Regular Business

The use of models is a regular element of the Academy's business. About half of all classes use models regularly and the use of models is an important part of the Academy's curriculum. The majority fails to acknowledge the significance of this factor, which supports the conclusion that the models are employees.

Factors Tending to Support Independent Contractor Status

There are some factors that tend to support independent contractor status, but those factors are much less significant than my colleagues make them out to be and are clearly outweighed by the factors supporting employee status. For example, I do not consider the parties' stated understanding of their relationship to be highly significant. I recognize that the Academy designates the models as independent contractors in their contracts, does not provide them with benefits offered its other employees, and distributes 1099 tax forms rather than W-2 forms. These are secondary indicia, however, and as such are in themselves insufficient to establish that the models are independent contractors. See, e.g., *Ridgewell's, Inc.,* 334 NLRB 37 (2001). An employer cannot change the employment status of his employees simply by calling them independent contractors or by failing to provide them with benefits bestowed upon its admitted employees.

In addition, I acknowledge that the Academy is not in the business of modeling. However, the function of the models is not tangential to the Academy's business. The Academy is in the business of providing art education, and the models play an important role in its educational programs.

The models are paid by the class, not by the hour. However, the amount paid per class is based on their previous per hour rate. Moreover, the change from an hourly wage to payment per class was made after the issue of the models' employment status arose and was intended specifically to be compatible with the Academy's position that the models are independent contractors.[2] In light of these circumstances, I find, contrary to my colleagues, that the significance of this factor is diminished.

The fact that the models sign semester-long agreements would ordinarily tend to support independent contractor status. However, in this case, the relevance of this arrangement is mitigated by the fact that all models are offered renewal contracts each semester as long as they continue to show up on time to their scheduled classes. Some of the models have worked for the Academy continuously for years. In practice, therefore, once a model begins to work for the Academy, the model can expect continued employment barring gross misconduct. This suggests an employer-employee relationship.

CONCLUSION

Considering all the factors and viewing the relationship as a whole, the conclusion is inescapable that the Employer has not met its burden of proof. I agree with the Regional Director that the overwhelming weight of the factors tips in favor of finding employee status. In reaching this conclusion, I particularly rely on the models' lack of entrepreneurial risk and opportunity for gain, the level of control over the models exercised by the Academy, the lack of skill or training necessary to obtain a modeling position with the Academy, and the extent to which the Academy relies on models to operate its business. These factors clearly outweigh those that would seem, on the surface, to support independent contractor status. When the relationship is viewed as a whole, it is clear that the Employer has not met its burden of showing that these models are independent contractors. Accordingly, I dissent.

[2] Gates testified that he recommended the change because "it made sense, you know, as independent contractors, you pay independent contractors by the job."